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No. 63551-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Dependency of P.P.T., J.J.I., O.L.T., minor children,

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES

Appellant,

v.

PETER TSIMBALYUK

Respondent.

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REPLY BRIEF OF CASA, APPELLANT

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I. INTRODUCTION

In its opening brief on appeal, Court Appointed Special Advocate Lori Reynolds (the "CASA") made clear that it was joining the State in appealing the Superior Court Order denying the petition to terminate Peter Tsimbalyuk's parental rights as to his three young children, P.P.T., J.J.I., and O.L.T, (the "Order") and in appealing the trial court's denial of the State's CR 60 Motion to vacate the Order and consider additional evidence. The CASA joined the State's opening brief, but also pointed out the serious legal error made by the Superior Court in leaving these young children in ongoing dependency and that the substantial evidence did not support the Superior Court's conclusion.

Mr. Tsimbalyuk makes several arguments in response, all of which are unfounded. While the CASA again joins in the reply brief submitted by the State, the CASA also separately replies to the following arguments of Mr. Tsimbalyuk.

Mr. Tsimbalyuk contends that discretionary review is not warranted for an appeal of the erroneous Order denying the termination petition. But the Commissioner has already ruled that the trial court's rulings are appealable as a matter of right. But even if the standard is one of discretionary review, the decision not to grant the termination of parental rights of this individual who has demonstrated his lack of fitness

for parenting, and instead to leave the children in ongoing dependency was a probable or clear error that foreclosed further action by the CASA or State and rendered further proceedings useless.

Mr. Tsimbalyuk argues that the Superior Court's application of RCW 13.34.180(1)(f) was not in error. But in so doing, Mr. Tsimbalyuk himself misapplies the law by insisting that a theoretical guardianship could exist and ignoring the statute's focus on the legal relationship of the parent and child. Moreover, the substantial evidence showed that subsection (f) was met.

Mr. Tsimbalyuk also argues denial of termination is in the best interest of the children. In support, he suggests that the CASA opposed termination; she did not. The CASA clearly testified that termination of Mr. Tsimbalyuk's parental rights would be in the best interest of the children. 7RP 878:6-9, 881:14-15.[1] Her testimony about continued "contact" with the father being in the children's best interest was solely in response to a hypothetical scenario in which the termination petition was denied.

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[1] There are eight volumes of transcripts in this case. For ease of reference, 1RP will refer to the transcript of February 10, 2009; 2RP will refer to the transcript of February 11, 2009, 3RP will refer to the transcript of February 12, 2009, 4RP will refer to the transcript of February 19, 2009, 5RP will refer to the transcript of February 23, 2009, 6RP will refer to the transcript of February 24, 2009, 7RP will refer to the transcript of February 25, 2009, and 8RP will refer to the transcript of March 25, 2009

In sum, the trial court erred in its Order denying termination and its subsequent denial of the CR 60 Motion. The result of this error is not, as Mr. Tsimbalyuk suggests, that the children were placed in guardianship. Rather, three young children have been left in ongoing dependency. Accordingly, the CASA joins the State in respectfully requesting the reversal of these decisions.

II. ARGUMENT

A. Denial of Termination and of the CR 60(b) Motion Should Be Reviewed by This Court as a Single Appeal

The State and the CASA both appealed from the trial court's denial of termination and denial of a CR 60 motion to consider additional evidence. The Commissioner concluded that the rulings of the trial court are appealable as of right and consolidated them on appeal. This decision was appropriate given that the Superior Court's denial of termination was a final judgment, and that consolidation would save time and expense and provide for a fair review.

1. Procedural background

In August 2008, the State filed a petition to terminate the parent-child relationships between Mr. Tsimbalyuk and his three sons. Mr. Tsimbalyuk opposed the termination with regard to all three children. Trial in King County Superior Court occurred on February 10, 11, 12, 19, 23, 24, and 25. CP 266. The Superior Court denied termination in an oral

decision on February 25, 2009, and a written decision was filed on March 25, 2009. CP 266. Following the denial of termination, the State and the CASA filed notices for discretionary review to the Washington Court of Appeals on April 24, 2009. CP 277.

The State also filed a Motion to Vacate and Reopen for Additional Evidence pursuant to CR 60(b)(1) and/or (11) ("CR 60 Motion") in Superior Court on May 8, 2009.[2] CP 319-352. The CR 60 Motion was based on additional evidence that the father refused to work cooperatively with relatives to provide an alternative permanent plan for the boys and therefore the Superior Court's assumption that such plans were viable was a mistake that created an irregularity in the proceedings. The Superior Court refused to hear the CR 60 Motion or require a response from the father and denied the motion without explanation. CP 354-55, 358-59. The State filed an appeal of the trial court's denial of the CR 60 Motion pursuant to RAP 2.2(a)(10) (allowing appeal of an order granting or denying a motion to vacate), which the CASA joined on May 21, 2009.

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[2] The State explicitly noted in its CR 60 Motion to Vacate that it was pursuing that alternative because it would better serve the needs of the three children in this case due to the inherent delays in filing for discretionary review or bringing a new termination petition, both of which it intended to pursue if denied. CP 321 n.1.

The State then moved to consolidate the appeal of the CR 60 Motion and the Notice of Discretionary Review, and the Commissioner issued its ruling on July 6, 2009 stating:

> The Department's petition for termination of the parent child relationship between Peter Tsimbalyuk and his children P.P.T., J.J.I., and O.L.T. were all tried together. The trial court denied and dismissed the petition for termination and the State of Washington Department of Social and Health Services and the Court Appointed Special Advocate filed notices of discretionary review as to each of the three children. When the trial court denied the Department's motion to vacate, the Department filed a notice of appeal as to all three children and the CASA joined in that notice of appeal. Those notices of appeal were all consolidated under No. 63551-4.
>
> It appears that the rulings by the trial court are appealable as a matter of right under RAP 2.2 (a).
>
> The Department has now filed a motion to consolidate all of the proceedings under one number and to permit the filing of one record on appeal. Because all of the issues sought to be raised on appeal arise out of the same trial court proceedings as to all three children, the motion is granted.
>
> Therefore it is ORDERED that No 63551-4, No. 63393-7, No. 63394-5, and No. 63395-3 are consolidated under No. 63551-4 and a single record on appeal shall be filed in this consolidated matter.

Ruling Consolidating Appeal, July 6, 2009 (Dkt. # 9).

2. The Commissioner appropriately consolidated the two appeals

The Commissioner considered the appeal of the denial of termination an appeal of right under RAP 2.2(a).[3] *See* Ruling Consolidating Appeal, July 6, 2009 (Dkt. # 9). Under RAP 2.2(a), a party has an appeal of right from a final judgment, RAP 2.2(a)(1), and a decision determining the action, RAP 2.2(a)(3). The denial of termination in this case fits the criteria of RAP 2.2(a)(1) or (3) because, as explained in the CASA's and the State's opening briefs, the Superior Court's decision was a final judgment in that there were no change in facts that would conceivably justify termination under the Superior Court's flawed analysis, which found that the father *could not parent* but denied termination solely to facilitate ongoing contact between the father and the children.

Moreover, consolidation of the appeal of the CR 60 motion and denial of termination was appropriate under RAP 3.3(b). Pursuant to RAP 3.3(b), "the appellate court, on its own initiative or on motion of a party may order the consolidation of cases...if consolidation would save time and expense and provide for a fair review." Here, there is no question that consolidation saves time and expense and provides for a fair review of the case. The two appeals are predicated on the denial of a petition for

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[3] Pursuant to RAP 6.2(b), Mr. Tsimbalyuk could have requested a hearing on whether the trial court's decision was reviewable as a matter of right or discretion.

termination concerning the three boys and therefore present the same facts and nearly identical issues. *Wouldridge v. Burns*, 265 Cal. App. 2d 82, 86 (1968) ("purpose of consolidation is merely to promote trial convenience and economy by avoiding duplication of procedure, particularly in the proof of issues common to both actions"). *State v. Freeman*, 47 Wn. App. 870, 871, 737 P.2d 704 (1987) (cases may be consolidated if present identical issues arising from the same facts); *see also State ex rel. Sperry v. Superior Court for Walla Walla County*, 41 Wn.2d 670, 251 P.2d 164 (1952) (court properly rejected consolidation of three separate actions involving numerous causes of action and defenses).

Mr. Tsimbalyuk argues that the State has no right to appeal the dismissal of a termination petition. Respondent Br. 23. However, Respondent's Brief does not address the CASA's right to an appeal on behalf of the children. The CASA is tasked to "represent the child's best interest." RCW 26.12.175. In furtherance of that role, the CASA has the right to participate in all proceedings, to introduce exhibits, to examine witnesses, and to *appeal*. Guardian Ad Litem Rule 4(e), (h)(3). In *In re Dependency of A.G.*, 127 Wn. App. 801, 808-09, 112 P.3d 588 (2005), this Court held that the State did not have a right to appeal termination decisions. However, the CASA did not join the State in the appeal of that case, only filing an amicus brief late in the case. Here, the CASA joined

the State in appealing the Superior Court's Order and the denial of the CR 60 Motion. Accordingly, there is a basis for the Court to address the dismissal of the termination petition (the CASA's appeal), as well as the denial of the CR 60 Motion (the appeals by the State and the CASA). The Commission properly consolidated the two appeals, and for the reasons set forth above, the Court should consider them as a single appeal at this time.

3. In any event, discretionary review is appropriate under the facts

Mr. Tsimbalyuk argues that appellants "have not even attempted to satisfy the requirements of RAP 2.3(b)." Respondent's Br. 2. As explained above, however, that is because the Commission's letter ruling concluded that the Superior Court's rulings at issue were "appealable as of right." But, in any event, the discretionary review standard is met here. RAP 2.3 provides that review may be accepted when "the superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act," or "the superior court has committed an obvious error which would render further proceedings useless." RAP 2.3(b)(1)-(2).

Here, the Superior Court committed both probable and obvious error for the reasons set forth in both the CASA's and the State's opening briefs. The Superior Court interpreted RCW 13.34.180(1)(f) contrary to Washington law, leaving the children indefinite dependents of the State.

The Superior Court disregarded the substantial evidence that the elements of the termination statute were met, and that termination was in the children's best interest.

These errors have both foreclosed the State from acting but also rendered further proceedings useless because the Superior Court left no possibility for any change in circumstances that would warrant a grant of termination. Mr. Tsimbalyuk argues that this Court should deny discretionary review because the State can still pursue a variety of alternative plans and still file a termination petition. Respondent Br. 28. He cites *In re Dependency of A.G.*, where the Court denied discretionary review. 127 Wn. App. at 808-09. However, in that case, the Superior Court explicitly allowed the mother one last chance to get treatment "now or never," otherwise "an order terminating her parental rights was a likely result of a subsequent proceeding." *Id.* at 804. Unlike *A.G.*, here, the Superior Court found the Mr. Tsimbalyuk incapable of parenting regardless of additional services, CP 272, Findings of Fact 1.20, and found that no amount of time would remedy the situation, CP 271, Findings of Fact 1.15, but denied termination solely to facilitate ongoing contact between the father and the children. The only change in circumstance the Superior Court left open was that "should Mr. Tsimbalyuk be deported, the court's opinion would certainly change." CP 275, Finding of Fact

1.35. The Court's order thus rendered further termination proceedings useless. These young children cannot wait for the father to be deported in order to find a permanent home. This was an error of law that needs to be immediately corrected by this Court, not addressed in a subsequent termination hearing that would present no new evidence as to the father's deficiencies.

Moreover, while the Superior Court assumed, and the father implies, that guardianship is a feasible alternative, no guardianship petition was pending before the Superior Court during trial and no guardianship petition has been filed by *any party*. The State attempted to bring the problems with a guardianship to the Superior Court's attention with the CR 60 Motion, but the Superior Court refused to hear that evidence.[4] The CR 60 Motion and supporting evidence showed that Mr. Tsimbalyuk is not amenable to guardianship and only interested in a solution where the boys are returned home to him. CP 343 (the CASA observed, "Peter made it clear that he does not intend to settle with respect to the two younger boys. His unwavering focus is regaining custody of the boys."). These facts further highlight the extent to which the Superior

[4] The CASA expressly stated that it joined the State's assignments of error and joined in the appeal of the CR 60(b) denial. In order to avoid duplication, the CASA did not include argument regarding the CR 60(b) denial in its opening brief.

Court's denial of termination left the State and the CASA without the ability to act and rendered all further proceedings useless.[5]

4. This Court should hear the merits of the case at this time

Given the reasons set forth above, this Court should hear the merits of the case and rule on the Superior Court's denial of the termination petition as well as the denial of the CR 60 Motion. The merits of the case have been fully briefed, and the children affected by this proceeding need a speedy resolution and permanency as soon as possible. Further delay would not serve their interests, the interests of justice, or judicial economy. Washington law provides that a child has a right to a "speedy resolution" of dependency proceedings. RCW 13.34.020. This Court has already treated this case as an motion for accelerated review pursuant to RAP 18.13A, Letter from Clerk, June 10, 2009 (instructing parties to file statement of arrangements and clerk's papers contemporaneously with notice of appeal pursuant to RAP 18.13A). The merits have been briefed by the parties and the appeal on the merits should proceed.

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[5] The Department has re-filed for termination in this case. In the interest of saving time and expense, and preventing further disruption for these families, this Court should resolve this matter at this time.

B. Continuation of the Legal Relationship with Their Father Diminishes These Children's Chances at Stability and Permanence

The Superior Court concluded that the State had proven all the elements required for a finding of termination, RCW 13.34.180(1), except subsection (f), "that continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home." The Superior Court's conclusion was based on serious errors of law that are repeated in Respondent's Brief. Further, the Superior Court ignored the substantial evidence when reaching this conclusion. While Mr. Tsimbalyuk attempts to argue that the evidence supported the Superior Court's conclusion, his brief mischaracterizes important testimony and ignores the fact that the CASA recommended termination, and that Dr. Borton, a psychologist, also expressed serious concerns about Mr. Tsimbalyuk's ability to parent, now or in the future.

1. The Superior Court erred when it interpreted RCW 13.34.180(1)(f)

The father argues that the Superior Court correctly held that subsection (f), which requires that the State prove "that continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home," was not met because continued contact with the father would be good for the children, making guardianship a better alternative than termination. The Superior Court's

analysis, however, turns subsection (f) on its head and focuses on the stability of the current placement, and on whether the placement will continue even absent termination. Yet, the law focuses on the continued effect of the parent's legal relationship with the children, and on whether it impedes speedy integration, and not what constitutes a stable and permanent home. Mr. Tsimbalyuk argues that the CASA "reads the statute out of existence." Respondent's Br. 37-38. However, the father disregards current Washington law holding that, where young children in a lengthy dependency do not have the option of guardianship, it follows that termination is appropriate.

Mr. Tsimbalyuk argues that subsection (f) was not met because "continued contact" would serve the children's interest. Respondent's Br. 29. However, this Court has held that subsection (f) "is mainly concerned with the continued effect of the *legal* relationship between parent and child, as an obstacle to adoption; it is especially a concern where children have potential adoption resources." *In re Dependency of A.C.*, 123 Wn. App. 244, 250, 98 P.3d 89 (2004). Tellingly, Mr. Tsimbalyuk's brief does not propose what a viable *legal* relationship with his children would look like, or how it would help achieve permanency for these boys. At most, the Superior Court and Mr. Tsimbalyuk suggest that he could act as "a favorite uncle" or a "visiting parent." CP 272, Findings of Fact 1.17;

Respondent Br. 31. The simple fact is that no number of favorite uncles and no number of weekend visits can foster a stable and permanent home for a child. Mr. Tsimbalyuk's focus on "contact" is therefore of little merit in determining whether subsection (f) was met, and whether his *legal* relationship with his children diminishes their chances at stability and permanence.

In support of his argument, Mr. Tsimbalyuk contends that a guardianship could theoretically be created for the children. Respondent's Br. 29. However, the State has not petitioned for guardianship, no other party has petitioned for guardianship (including the father, who could identify an appropriate guardian and petition the court), and there is evidence the father would not agree to guardianship. CP 343. The *only* options before the Superior Court were termination or a return to indefinite, ongoing foster care. *See In re K.S.C.*, 137 Wn.2d 918, 930, 976 P.2d 113 (1999) (in the absence of a guardianship petition, alternatives are termination or continue dependency and foster placement). In *In re Dependency I.J.S.*, this Court distinguished between a case where the State petitioned only for termination and a case "*where both options are presented,*" and held that "when faced solely with a petition for termination...the court's inquiry is whether the allegations in RCW 13.34.180 are proved...and whether termination is in the best interest of

the child." 128 Wn. App. 108, 119, 114 P.3d 1215 (2005) (internal citations omitted). By misapplying subsection (f), the Superior Court did not order a guardianship, it simply left the children as indefinite dependents of the State.

The Superior Court also held that subsection (f) was not met because the children's current homes were "not stable and permanent short of termination and adoption." CP 275, Conclusions of Law 2.2. In so finding, the Superior Court essentially imposed a requirement that the State must prove that a child's current foster care placement is *not stable and permanent.* In other words, under the Superior Court's analysis, termination may not be granted where the children are already placed in a safe, stable, foster home. This is not the law. This Court has held that termination is appropriate even where children are settled in a stable foster care or relative placement. *See In re Dependency of C.B.*, 134 Wn. App. 336, 139 P.3d 1119 (2006) (termination appropriate even where children settled into stable foster care placement); *In re Dependency of S.M.H.*, 128 Wn. App. 45, 59, 115 P.3d 990 (2005) (where children were in potentially permanent homes, children's prospects for early integration were nonetheless diminished). These cases support the goal of permanency established by the Washington legislature. *See* RCW 13.34.136. Thus,

the Superior Court erred in concluding that subsection (f) was not met solely because the boys are currently placed in stable homes.

Furthermore, the Washington Supreme Court has noted that "the main focus" of RCW 13.34.180(1)(f) is "whether [the parent-child relationship] impedes the child's prospects for integration, *not* what constitutes a stable and permanent home." *In re Dependency of K.S.C.*, 137 Wn.2d 918, 927, 976 P.2d 113 (1999) (emphasis added). Importantly, the Superior Court's decision said nothing about "early integration" in its Conclusions of Law. Because the Superior Court ignored the plain terms of the statute in concluding that subsection (f) was not met, it erred as a matter of law and should be reversed.

Mr. Tsimbalyuk erroneously argues that the State and the CASA "read both RCW 13.34.180(1)(f) and RCW 13.34.190 out of existence." On the contrary, the CASA relies on current case law in Washington, and in this Court, that a finding that a child's prospects for early integration into a stable and permanent home are diminished "necessarily follows" from a finding that there is little likelihood the parent will be able to resume parenting in the near future. *In re Dependency of J.C.*, 130 Wn.2d 418, 426-27, 924 P.2d 21 (1996); *In re Dependency S.M.H.*, 128 Wn. App. at 59; *In re Dependency of D.A.*, 124 Wn. App. 644, 657, 102 P.3d 847 (2004); *In re Dependency of T.R.*, 108 Wn. App. 149, 166, 29 P.3d 1275

(2001). For example, in *In re Dependency of T.R.*, where the mother argued that reunification was theoretically possible, but the child's entire six-year lifetime had passed without reunification, this Court held that "theoretical possibilities are not enough" and termination was appropriate. 108 Wn. App. at 166. And in *In re Dependency of S.M.H.*, where a two and half year-old and a four year-old had been in foster care almost their entire lives, it "necessarily followed" that the ongoing parent-child legal relationship diminished the children's prospects for early integration. 128 Wn. App. at 59. These cases appropriately found that subsection (f) necessarily followed from a finding that the other elements are met where the children were young and guardianship was not an alternative, because the only options were continued dependency or termination. Even if these cases did not apply, for the reasons stated above and in the next section, the CASA has demonstrated, *independent* of such case law, that subsection (f) was met.

Finally, the Superior Court and the father read into subsection (f) a requirement that risks jeopardizing family bonds; that is, that relative caregivers themselves must actually appear in court and testify against their relative that he or she should not be allowed to parent. CP 274, Findings of Fact 1.26 ("[T]he court recognizes that it is awkward for the petitioner to call caregivers at a termination trial, the court suggests that

narrow inquiry might be elucidating to the court without treading upon the prohibited area of comparative fitness"); CP 274, Finding of Fact 1.30 ("the court is not persuaded that the caregivers would terminate their relationship with the children if adoption was not the sole option"); Respondent's Br. 16, 22 (DSHS failed to call relatives to testify). By placing the burden on relatives to testify against their brother or give up the children, the Court sets a dangerous precedent for relative caregivers who are able and willing to adopt but do not wish to testify against family.

2. Substantial evidence showed that a continued legal relationship diminished the boys' chances at stability and permanency

Even if this Court concludes that the Superior Court did not err in applying the statute, there is substantial evidence to support a conclusion that subsection (f) was met.

The Superior Court's own Findings of Fact support a conclusion that the continued legal relationship with the father diminishes the children's prospects for permanence and stability. "All three children are in need of a permanent home, given the instability they have faced in their biological home and the length of time they have spent in out-of-home care," the Superior Court stated. CP 274, Findings of Fact 1.25. The Superior Court found that "Mr. Tsimbalyuk's perpetration of domestic violence continues to be a parental deficiency that has not been corrected

and will not be corrected in the near future." CP 271, Findings of Fact 1.15. The Superior Court found that Mr. Tsimbalyuk's testimony that he is capable of resolving his parenting deficiencies in order to resume caring for his children is "not credible." CP 270, Findings of Fact 1.10. Despite warnings from a social worker and the CASA that it would hurt his chances of getting his children back, Mr. Tsimbalyuk continued to have a relationship with the mother of J.J.I. and O.L.T. and married her in September 2008. CP 269, 1RP 103:1-14; Findings of Fact 1.10.

Mr. Tsimbalyuk argues that the State's witnesses failed to prove that the parent-child relationship diminished the boys' prospects for early integration into a stable and permanent home. However, he primarily relies on the testimony of the CASA and Dr. Borton, both of which he mischaracterizes by quoting them out of context.

First, the father insists that the CASA's testimony shows that subsection (f) was not proven. However, when asked explicitly if "continuation of the parent-child relationship diminished the children's prospects for a safe, stable, and permanent home," the CASA answered unequivocally "Yes." 7RP 874:12-14. The CASA also testified that prolonging the current temporary situation creates additional hardship: "it's very clear that . . . it's hard on the family having this kind of gray care-giving relationship with the kids. They love their brother and they

want to take care and provide permanency for these kids, and it's a pretty delicate situation." 7RP 875:2-23.

Second, Mr. Tsimbalyuk argues that Dr. Borton supported an ongoing parent-child relationship. Importantly, Dr. Borton based his analysis on only three hours with the father and one hour with the boys more than a year earlier, in October 2007. 3RP 396:16, 392:16-19, 424: 6-9. He specifically stated at trial that his report was based on what he knew "at the time" and he didn't "know what's happened since." 3RP 432:11-13. In fact, at the time, Mr. Tsimbalyuk claimed that he had not contacted Ms. Irby in over six months; by trial, he had married her. 3RP 396:20-22; 1RP 103:1-14. At the time, Mr. Tsimbalyuk was undergoing domestic violence treatment; by trial, Dr. Borton was "surprised" to learn that Mr. Tsimbalyuk had quit the program long ago. 3RP 431:13. Dr. Borton concluded that the parties "may want to consider guardianship." However, he never recommended that the children be placed in a situation of ongoing, indefinite foster care.

C. Termination Is in the Best Interest of These Boys

The Superior Court held that "a dependency guardianship or long term relative care agreement would be in the children's best interest rather than termination." CP 275-76, Conclusions of Law 2.3. However, no petition for guardianship or alternative plan was before the Superior Court.

Given that the Superior Court's *only* choice was between termination and ongoing indefinite foster care, the Superior Court should have held that termination is in the best interest of these three boys. Instead, the Superior Court's Order left the children facing indefinite dependency.

While Mr. Tsimbalyuk extensively cites the benefits of guardianship in his Respondent's Brief, the merits of guardianship are not at issue. Respondent's Br. 34-37. No guardianship petition was before the Superior Court and no party—including Mr. Tsimbalyuk—has ever petitioned for guardianship or even identified a viable guardian. Moreover, the Respondent's Brief fails to mention that Mr. Tsimbalyuk himself is opposed to establishing a guardianship, and would only consider it as a means to regain custody of his children. CP 343.

Mr. Tsimbalyuk's refusal to accept an alternative to full return of custody, at least of the two younger children, was the basis of the State's CR 60 Motion. CP 320. After trial, the CASA met with the parties to discuss the viability of alternative plans such as guardianship. CP 341-46. In these meetings, Mr. Tsimbalyuk stated that he might consider adoption with respect to P.P.T., the eldest child who is placed with his grandmother. CP 343-44. However, he rejected the idea of guardianship or adoption with respect to J.J.I. or O.L.T., who are currently living with the paternal aunt and uncle. CP 344. Mr. Tsimbalyuk also threatened to send the

children to live with relatives in Tennessee or take them back to Ukraine with him. CP 349. Therefore, without cooperation from Mr. Tsimbalyuk himself, guardianship is not a viable alternative.

Notwithstanding the fact that Mr. Tsimbalyuk does not present any viable alternatives, he argues that the State failed to prove that termination was in the children's best interest. Mr. Tsimbalyuk argues that the CASA "concurred...that continued contact would serve the best interests of the children." The context for this testimony by the CASA is as follows. The CASA was asked if she agreed, hypothetically, that *if* parental rights were terminated would the family continue to allow some contact with the father. She answered "yes" and also stated that, *if* parental rights were terminated, "some future contact would be in the boys' best interest." 6RP 869:13-21. Nonetheless, she stated that termination was in the boys' – actual, not hypothetical – best interest. 7RP 878:6-7. Tellingly, the CASA stressed that an additional six months or a year to engage in services would not make a difference; it would still not be in the children's best interest to be returned to their father's care. 7RP 874:25.

Mr. Tsimbalyuk insists that Dr. Borton's testimony was that termination was not in the children's best interest. In fact, as discussed above, Dr. Borton based his testimony on outdated information and admitted he "didn't know what's happened since." 3RP 424: 6-9. More

important, Dr. Borton testified that Mr. Tsimbalyuk was "deceptive," 3RP: 397:19, 425:25, had a history of substance use, 3RP:401:1-3, and that "it worries me a bit that he has a history of developing in a domestically violent home, he has a personality style that's consistent with violation of law and attention to his own self interests over those of others." 3RP 422:23- 423:3. Ultimately, when asked for his conclusions about Mr. Tsimbalyuk's ability to parent, Dr. Borton stated that "the risks are pretty high, that long-term bonding is not there, and that the ability to recognize his children's needs and provide for them on a day-to-day basis over a consistent and long period of time was lacking." 3 RP 423:22- 424:2. Finally, while Dr. Borton encouraged guardianship, he did not testify that he supported ongoing foster care in the absence of a guardianship.

Mr. Tsimbalyuk argues that appellants cite outdated case law that is interpreting an old version of the statute by arguing that guardianship is "inherently temporary" and leaves the child "in limbo." However, the CASA did not argue that guardianship would leave the children in limbo—the CASA pointed out that the Superior Court's Order, which did not establish guardianship but rather simply denied termination—left the children as indefinite dependents facing a lifetime of limbo as foster children. CASA Br. 30-33.

Moreover, this Court has stated recently that termination is more appropriate than guardianship for children who "have lived in *limbo* their entire lives and deserve permanency and stability." *In re Dependency of S.M.H.*, 128 Wn. App.at 60 (emphasis added). For example, in *In re Dependency of A.C.*, 123 Wn. App. 244, 251, 98 P.3d 89 (2004), cited by Mr. Tsimbalyuk for a "flexible" approach to permanency, this Court upheld termination instead of guardianship because:

> [T]he court noted that S.Y. and A.C. were young and had not seen their extended family since they left the Jacksons' home approximately 17 months earlier. The court found Chaffin **had little to no parenting history with regard to the children, that she had been unable to create a safe and stable home** for herself or the children, and that the children had established relationships in their current placement, a potential adoptive home. The court found that **another move would not be in their best interests.**

Id. at 255 (internal quotations omitted).

Here, these three boys have similarly lived in limbo their entire lives and are in need of permanency and stability. The CASA testified that the middle son, J.J.I., is very fragile as a result of "the instability, the lack of nurturing," and that he "doesn't have another move, another big change in him." 7RP 891:14-18. O.L.T. and J.J.I. have been moved several times, with both relatives and non-relative foster parents. 6RP 715:1-15. The CASA testified that the oldest son, P.P.T., is the only boy

who has had a relationship with his father. Nonetheless, P.P.T. has spent most of his life in the care of his paternal grandmother, 6RP 856:1-14, and "he needs stability, consistency, permanency," she stated. 7RP 892:3-4.

Therefore, because the *only* options before the Superior Court were termination or ongoing, indefinite foster care, and the substantial evidence supported termination as in the boys' best interest, the Superior Court's conclusion was in error and should be reversed.

III. CONCLUSION

For the reasons set forth above, the CASA urges this Court to reverse the Superior Court's Order and to enter an order terminating the father's parental rights to these children.

RESPECTFULLY SUBMITTED this 26th day of October, 2009.

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DECLARATION OF SERVICE

I, Karen R. Brunton, declare under penalty of perjury under the laws of the State of Washington that on October 26, 2009, I caused to be delivered a copy of the *Reply Brief of CASA, Appellant* in the above-captioned proceedings to the following counsel by the methods indicated:

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